

## Class Action Litigation

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# New Jersey Supreme Court Significantly Limits TCCWNA Claims

By **Joseph A. Fischetti**

### What You Need To Know:

- The New Jersey Supreme Court has handed down a decision substantially curtailing the ability of plaintiffs to recover civil penalties and attorneys' fees under TCCWNA. Such claims are now viable only upon demonstration that a plaintiff suffered "some form of harm" or "adverse consequences" beyond mere exposure to a violative document.
- This decision represents the second significant victory in a year for TCCWNA defendants in the New Jersey Supreme Court.
- The decision will frustrate the ability of plaintiffs to certify classes of consumers in TCCWNA claims and will likely end the parade of no-injury TCCWNA class actions that have grown pervasive in New Jersey courts over the past several years.

The New Jersey Supreme Court has issued a landmark decision limiting the breadth of permissible claims under New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 *et seq.*

Under TCCWNA, it is unlawful for a "seller, lessor, creditor, lender or bailee" to "offer to any consumer ... or enter into any written consumer contract ... which includes any provision that violates any clearly established legal right of a consumer ... as established by State or Federal law at the time the offer is made or the consumer contract is signed ...." Critically, any person who violates TCCWNA "shall be liable to the *aggrieved consumer* for a civil penalty of not less than \$100.00 or for actual damages, or both ... together with reasonable attorneys' fees and court costs." (Emphasis added.)

In recent years, New Jersey has seen an explosion of TCCWNA class actions. Typically, plaintiffs' attorneys bring such cases by locating an arguably

unenforceable term in a form or boilerplate consumer contract and then suing on behalf of all consumers who ever entered into that contract. In many of these cases, the plaintiffs seek to recover civil penalties for idle contractual language that was never invoked against them. In defense of these claims, defendants have taken the position that to recover damages, a plaintiff must be an "aggrieved" consumer, meaning that he or she must have been harmed in some way beyond merely entering into a contract containing unenforceable language.

On April 16, 2018, in a unanimous opinion authored by Justice Anne M. Patterson in two consolidated cases, *Spade v. Select Comfort Corp.* and *Wenger v. Bob's Discount Furniture*, No. A-57-16, the Supreme Court finally answered "whether a consumer who receives a contract containing provisions that violate [New Jersey law], but who has suffered no adverse consequences as a result of the contract's noncompliance ... constitutes an 'aggrieved consumer'" who is eligible to recover a

civil penalty and attorneys' fees under TCCWNA.

Following a detailed review of TCCWNA's statutory construction, the Court held that a "consumer" is not an "aggrieved consumer" eligible to recover a civil penalty under TCCWNA unless he or she has "suffered some form of harm" or "adverse consequences" as a result of the defendant's conduct. The court specifically held that a plaintiff who has "merely been exposed to unlawful language in a contract or writing, to no effect" is not eligible to recover a civil penalty.

The Court was careful to note that "harm" or "adverse consequences" does not necessarily mean that the plaintiff must have incurred monetary damages. For example, if a consumer is deterred from enforcing his or her legal rights as a result of impermissible and unenforceable contractual language, such a person "may" qualify as an aggrieved consumer eligible to recover civil penalties.

This decision will provide defendants with a powerful tool to combat TCCWNA claims, especially when they are brought as class actions. In the past, plaintiffs crafted TCCWNA class actions so that they included every consumer who was ever exposed to the offending language, even if the consumer was not even aware that the language existed. Following *Spade/Wenger*, however, a consumer can recover a civil penalty

only upon showing that he or she suffered some form of individual harm or adverse consequence as a result of the violative contractual language. This newly clarified element of TCCWNA will create many plaintiff-specific questions that will complicate class certification efforts. Specifically, to recover civil penalties, all class members must now demonstrate they were affected by the offending language. This onerous proof may very well prove untenable in many class actions, rendering it practically impossible for plaintiffs to demonstrate predominance or superiority.

The Supreme Court's decision in *Spade/Wenger* comes on the heels of its decision last fall in *Dugan v. TGI Fridays, Inc.* There, the court held that restaurant customers suing under TCCWNA for violation of a statute requiring the listing of drink prices on menus could not bring their claims on a classwide basis where it would be impossible to discern whether any particular customer of the restaurant had actually been presented with or reviewed the allegedly offending menu.

Taken together, the Supreme Court's decisions in *Spade/Wenger* and *Dugan* demonstrate a clear trend in favor of stifling abusive, no-injury class actions and restoring TCCWNA to its modest purpose of ensuring that consumers do not suffer actual harm as a result of the inclusion of unenforceable language in contracts.

## Contacts

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